

March 27, 2012

Bruce D. Goldstein
County Counsel
County Administration Center
575 Administration Drive, Room 105A
Santa Rosa, CA 95403

Re: Your Request for Informal Assistance
Our File No. A-12-035

Dear Mr. Goldstein:

This letter responds to your request for advice regarding the conflict of interest provisions of the Political Reform Act (the “Act”).¹ We base this letter on the facts presented. The Fair Political Practices Commission (the “Commission”) does not act as a finder of fact when it renders assistance. (*In re Oglesby* (1975) 1 FPPC Ops. 71.) Because your inquiry is general in nature and does not involve a specific decision, we will treat your letter as a request for general information

Additionally, our advice is based solely on the provisions of the Act. We offer no opinion on the applicability, if any, of other conflict of interest laws.

QUESTIONS AND CONCLUSIONS

1. Does the Act prohibit you, in your capacity as County Counsel or General Counsel of other agencies, from advising a county department (the “County”) or other government agency (the “Agency”) (collectively “the Contracting Entities”) regarding a consulting contract between the Contracting Entity and your spouse if the County Board of Supervisors exercises authority and approval over the Contracting Entity?

¹ The Political Reform Act is contained in Government Code Sections 81000 through 91014. All statutory references are to the Government Code, unless otherwise indicated. The regulations of the Fair Political Practices Commission are contained in Sections 18110 through 18997 of Title 2 of the California Code of Regulations. All regulatory references are to Title 2, Division 6 of the California Code of Regulations, unless otherwise indicated.

Yes. You are prohibited from advising the Contracting Entity regarding a decision involving the contract if the decision would have a reasonably foreseeable material financial effect on your spouse's business.

2. Does the Act prohibit you from advising the Agency regarding a contract between your spouse and the Agency if the Agency has its own independent board, although one or two supervisors may be members of that board?

Yes. You are prohibited from advising the Agency if the decision would have a reasonably foreseeable, material financial effect on your spouse's business.

3. Does the Act prohibit you from advising the Contracting Entity regarding a master contract with a larger firm that will then subcontract part of the work to your spouse after the master contract is awarded?

No. You are not prohibited from advising the Contracting Entity, so long as (a) your spouse neither initiates, nor is named in, the bidding process, and (2) the reasonably foreseeable financial effect of the decision will not increase/decrease her business entity's gross revenues, liabilities or asset value by \$20,000 or more, or its expenses by \$5,000 or more.

4. Does the Act prohibit you from advising a Contracting Entity regarding a contract that is a renewal of an expired contract with your spouse entered into prior to your appointment as County Counsel or General Counsel?

Yes. You are prohibited from advising the Agency regarding a decision involving the contract if the decision would have any reasonably foreseeable financial effect on your spouse's business.

5. Does the Act prohibit you from advising the County regarding a contract with your spouse if the contract does not require Board of Supervisors approval for the sole reason that the value of the contract falls below a dollar threshold?

Yes. You are prohibited from advising the County regarding a decision involving the contract if the decision would have any reasonably foreseeable financial effect on your spouse's business.

6. Would you have a conflict of interest if either you, or the Contracting Entity, were to assign the legal work on a contract to outside attorneys, or attorneys on your staff, if the attorney performs the work independently, without your input or participation?

No. You would not have a conflict of interest, provided that the attorney independently advises the Contracting Agency without your input or participation, and does not apply policies or procedures that you have established for the particular contract.

FACTS

In January 2011, you were appointed by the Sonoma County Board of Supervisors to the position of Sonoma County Counsel to serve for a four-year term. Your office has approximately 30 attorneys, including three Chief Deputies and one Assistant County Counsel. You previously served as the Assistant County Counsel for five years. As County Counsel, you are an employee of the County principally serving and representing the Board of Supervisors. In addition, the County Counsel's office represents several other departments and agencies, some of which have a separate, independent Board of Directors.

Your wife has operated a land use planning consulting business for over 30 years. She, either individually or through subcontracts with larger firms, serves only public agencies (rather than private developers). She currently has a subcontract with a consulting firm to work on an Environmental Impact Report for the Sonoma County Open Space District (the "Open Space District"). The members of the Open Space District's Board of Directors are the same as the members of the County Board of Supervisors. Your wife also has a contract to perform environmental analysis for the Sonoma Marin Area Rail Transit District ("SMART"), which has an independent Board of Directors. Both entities are represented by the County Counsel's Office. Each of these contracts was entered into prior to your becoming County Counsel. When your wife has received income from any entity in which she works within the geographic boundaries of the County, you have reported the financial information on Form 700.

The Open Space District and SMART are interested in renewing your wife's consulting agreements. In addition, other County departments have expressed interest in having her manage, as a consultant, environmental review of complex projects in the future.

In Sonoma County, County contracts over \$25,000 typically come to the Board of Supervisors for approval. Most contracts are also "approved as to form" by the County Counsel's Office. Since the time your wife received the SMART contract, (over five years ago), your office has had in place an "ethical wall" to screen you from any SMART matter that might be related to your wife's contract. Typically land use matters, the types of issues related to your wife's work, are handled in your office by the Land Use Chief Deputy.

ANALYSIS

The Act's conflict of interest provisions ensure that public officials will "perform their duties in an impartial manner, free from bias caused by their own financial interests or the financial interests of persons who have supported them." (Section 81001(b).) Section 87100 prohibits any public official from making, participating in making, or otherwise using his or her official position to influence a governmental decision in which the official has a financial interest.

The Commission has adopted an eight-step standard analysis for deciding whether an official has a disqualifying conflict of interest. (Regulation 18700(b).) The general rule,

however, is that a conflict of interest exists whenever a public official makes a governmental decision that has a reasonably foreseeable material financial effect on one or more of his or her financial interests.

Step 1: Are you a public official?

As County Counsel, you are a “public official” within the meaning of the Act. (Section 87200.)

Step 2: Will you be making, participating in making or influencing a governmental decision?

A public official “makes a governmental decision” when the official, acting within the authority of his or her office or position, votes on a matter, obligates or commits his or her agency to any course of action, or enters into any contractual agreement on behalf of his or her agency. (Regulation 18702.1.)

A public official “participates in a governmental decision” when, acting within the authority of his or her position and without significant substantive or intervening review, the official negotiates, advises, or makes recommendations to the decisionmaker regarding the governmental decision. (Regulation 18702.2.)

A public official is attempting to use his or her official position to influence a governmental decision if, for the purpose of influencing the decision, the official contacts or appears before or otherwise attempts to influence, any member, officer, employee, or consultant of his or her agency. (Regulation 18702.3.)

Questions 1, 2, 4 and 5 - Contracts made directly with your spouse as to which you personally advise the Contracting Entity.

You state that the County Counsel’s Office advises the County, including the Board of Supervisors and departments of the County, and other Agencies regarding consulting contracts and also approves such contracts “as to form.” Your facts indicate that, as County Counsel or General Counsel, your advice to a Contracting Entity is given without significant substantive or intervening review. Therefore, under the circumstances you describe in your questions 1, 2, 4, and 5, (advising a Contracting Entity over which the Board of Supervisors has authority; an Agency that has its own independent board; a Contracting Entity wishing to renew a contract; the County on contracts that do not require Board of Supervisors approval), you will be participating in or influencing a governmental decision.

Question 3 – Master contracts with firms that will subcontract some of the work to your wife.

When advising a Contracting Entity regarding such a master contract, you will be participating in and influencing a governmental decision regarding the master contract.

Question 6 – Contracts that have been assigned to outside attorneys or staff attorneys.

You indicate that, from time to time, you, or an agency for which you act as General Counsel, hire outside counsel to provide legal services regarding consulting contracts. The legal work is, nonetheless, coordinated by your office. In addition, you assign certain contracts to individual staff attorneys that typically specialize in the area of law involved in a particular contract. You suggest that, in doing so, you may avoid a conflict of interest because the attorney performs the legal services independently, without your input or participation. You describe this procedure as creating an “ethical wall” under which you would not be participating in or influencing a governmental decision.

Commission staff has previously considered a similar situation involving the Bureau Chief of a division of the State Controller’s Office. (*Florence* Advice Letter, No. A-99-179.) Technical staff in the division evaluated the technical aspects of requests for proposal and bid proposals. The Bureau Chief would often be involved in the evaluations by establishing a policy to be used by staff performing the evaluations and by providing answers and guidance to staff members coming to him with questions regarding a proposal’s technical capabilities, policy and direction. We advised that the Bureau Chief would be influencing the governmental decision if he were to set policies and procedures specifically for the particular procurement. Where, on the other hand, the Bureau Chief established general policies and procedures that would apply to all procurements of the type involved, he would not be influencing the governmental decision.

Applying this standard, we find that you would not be participating in or influencing the Contracting Entity’s decision regarding a contract if, as you have described, the assigned attorney independently advises the Contracting Agency without your input or participation and does not apply policies or procedures you have established for the particular contract.

Step 3: What are your economic interests?

Your facts reveal the following economic interests.

- Business Entity. A public official has an economic interest in a business entity in which he or she has a direct or indirect investment of \$2,000 or more. (Section 87103(a).) “Indirect investment” is defined to include any investment owned by the spouse of an official. We assume that your wife has at least a 10% interest in her

business and her investment in the business is at least \$2,000. Thus, you have an economic interest in the business as an investment.

We assume that your wife has a 10% or greater interest in her business and that her investment in the business is \$2,000 or more. Thus, you have an economic interest in her business.

- Source of income. A public official has an economic interest in any source of income, including promised income, which aggregates to \$500 or more within 12 months prior to the time in which the relevant governmental decision is made. (Section 87103(c); Regulation 18703.3.) This includes community property income. (Section 82030.) Under Section 87103(c) and 82030, this also includes a pro rata share of income from a client of the business if the official's direct or indirect ownership interest in the business is ten percent or more.

You have a community property interest in the income of your wife's business, and, therefore, the business as a source of income to you if your share of the income is \$500 or more within 12 months prior to the time a governmental decision is made.

- Personal Finances. A public official has an economic interest in his or her personal finances and those of his or her immediate family and may have a conflict of interest in any decision resulting in an increase or decrease in the personal expenses, income, assets or liabilities of the official or his or her immediate family. (Section 87103; Regulation 18703.5.)

Step 4: Are Your Economic Interests Directly or Indirectly Involved in the Governmental Decision?

Business Entities and Sources of Income

A person, including a business entity and a source of income, is directly involved in a decision before an official's agency when that person, either directly or indirectly by an agent:

“(1) Initiates the proceeding in which the decision will be made by filing an application, claim, appeal, or similar request or;

“(2) Is a named party in, or is the subject of, the proceeding concerning the decision before the official or the official's agency. A person is the subject of a proceeding if a decision involves the issuance, renewal, approval, denial or revocation of any license, permit, or other entitlement to, or contract with, the subject person.” (Regulation 18704.1(a).)

Questions 1, 2, 4, 5 and 6. When your wife bids on contracts with a Contracting Entity, she will be directly involved in the Contracting Entity's decision to enter into the contract, as she would be initiating or would be a named party of the proceeding.

Question 3. When your wife's business teams up with larger firms as a subcontractor, her business will not be directly involved in the decision, so long as she does not initiate, nor is named in the bidding process of the master contract.

Personal Finances

The personal finances of a public official or his or her immediate family are always deemed to be directly involved in a governmental decision if the decision will have any financial effect on his or her personal finances or those of his or her immediate family. (Regulation 18704.5.) Accordingly, your wife would be directly involved in a decision regarding a contract that will result in any increase or decrease in her personal expenses, income, assets or liabilities.

Step 5: Applicable Materiality Standard.

A conflict of interest may arise only when the reasonably foreseeable impact of a governmental decision on a public official's economic interest is material. (Section 87103; Regulation 18700(a).)

Directly Involved Business Entity

Where a business entity is *directly involved* in a decision before an official's agency, the financial effect of the decision is presumed to be material. (Regulation 18705.1 (b)(1).²) The presumption can be rebutted by proof that it is not reasonably foreseeable that the governmental decision will have *any* financial effect on the business entity. This is the standard that applies to contracts in which your wife contracts directly with a Contracting Entity.

Indirectly Involved Business Entity

Where a business entity which is also a source of income to the official is *indirectly* involved in a decision before an official's agency, the appropriate materiality standard is found in Regulation 18705.1. (See, Regulations 18705.1 and 18705.3(b)(1).) The applicable materiality standard depends on the size of the entity. (See, Regulation 18705.1.) For a

² Regulation 18705.1(b)(2) provides an exception to this rule where the public official's investment in the business entity is \$25,000 or less and the business entity is listed in the Fortune 500, has revenues that are no less than the revenues of the business entity that ranks 500th in the Fortune 500, is listed on the New York Stock Exchange, or, for its most recent fiscal year had net income of no less than \$2.5 million. We assume that this exception does not apply.

relatively small business that is not publicly traded, which we assume correctly describes your wife's business, Regulation 18705.1(c)(4) provides:

“[T]he financial effect of a governmental decision on the business entity is material if it is reasonably foreseeable that:

“(A) The governmental decision will result in an increase or decrease in the business entity's gross revenues for a fiscal year in the amount of \$20,000 or more; or,

“(B) The governmental decision will result in the business entity incurring or avoiding additional expenses or reducing or eliminating existing expenses for a fiscal year in the amount of \$5,000 or more; or,

“(C) The governmental decision will result in an increase or decrease in the value of the business entity's assets or liabilities of \$20,000 or more.”

Personal Finances

Effects on an official's personal finances are material as stated in Regulation 18705.5(a), which provides:

“A reasonably foreseeable financial effect on a public official's personal finances is material if it is at least \$250 in any 12-month period. When determining whether a governmental decision has a material financial effect on a public official's economic interest in his or her personal finances, neither a financial effect on the value of real property owned directly or indirectly by the official, nor a financial effect on the gross revenues, expenses, or value of assets and liabilities of a business entity in which the official has a direct or indirect investment interest shall be considered.”

Step 6: Is it Reasonably Foreseeable That the Financial Effect of the Governmental Decision Upon Your Economic Interests Will Meet the Applicable Materiality Standard?

Whether a material financial effect is foreseeable at the time a decision is made depends on facts and circumstances peculiar to each case. A financial effect need not be certain to be considered reasonably foreseeable but it must be more than a mere possibility. (*In re Thorner* (1975) 1 FPPC Ops. 198.)

Under your facts, we believe that, in most cases, the reasonably foreseeable financial effect of a decision to enter into a contract with your wife will be material. Materiality is presumed for decisions in which a business entity is directly involved. Where, however, the contract is a master contract between the Contracting Entity and a larger firm that will

ultimately subcontract some of the work to your wife, the governmental decision to enter into the master contract may be less likely to have a material financial effect on your wife's business in that the decision. The Commission does not act as a finder of fact in providing advice. Therefore, the foreseeability of a particular financial effect is a determination that must be left, in most instances, to the informed judgment of the public official.

For contracts that will be handled by a staff attorney or outside counsel, you will need to ensure that the attorney performs the work without your input or participation and without applying policies and procedures you have established for the particular contract in order to avoid a potential conflict of interest.

Steps 7 & 8: The “public generally” and “legally required participation” exceptions.

Even if a material financial effect on a public official's economic interest is reasonably foreseeable, he or she still may not be disqualified if the financial effect of the governmental decision on the public official's economic interest is indistinguishable from its effect on the public generally (Section 87103, Regulations 18700(b)(7) and 18707(a)), or if the official is legally required to participate (Section 87103; Regulation 18708). You have not presented any facts indicating that either of these exceptions is applicable to your situation.

If you have other questions on this matter, please contact me at (916) 322-5660.

Sincerely,

Zackery P. Morazzini
General Counsel

By: Valentina Joyce
Counsel, Legal Division

VJ:jgl